

In the Matter of)
)
Telecommunications Services)
For Individuals with Hearing and Speech) CC Docket No. 03-123
Disabilities, and the Americans with)
Disabilities Act)
)

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TABLE OF CONTENTS

	Summary.....	ii
I.	Introduction and Background.....	1
II.	Variable Tiered Multi-Year Rate Methodology.....	9
III.	Outreach and Marketing Costs Should Be Compensable.....	
	11	
IV.	Costs Associated with Research and Development Should be Compensable.....	14
V.	Conclusion.....	15

SUMMARY

CSDVRS urges the FCC to adopt a rate methodology for video relay services (VRS) that fairly reimburses providers for their reasonable costs of providing this service, including costs associated with research and development and expenses attributable to outreach and marketing; promotes competition; and ensures compliance with the Americans with Disabilities Act's (ADA's) mandates for functional equivalency.

The past several years have been characterized by sudden, erratic, and unexpected shifts in VRS cost recovery. During each of these years, the failure to follow uniform and transparent cost recovery policies and the sudden policy reversals that have occurred consistently have left providers guessing as to what will be allowed as compensation for video relay services. Unfortunately, this year has been no different, with the seemingly haphazard recommendation of no fewer than 24 possible VRS rates, based on at least 6 different rate methodologies.

CSDVRS urges the FCC to reject NECA's proposed rates because these rates have been driven by the one provider able to achieve economies of scale, and would therefore result in the over-compensation of that provider and the under-compensation of most, if not all, others. If adopted, the end result would be a government-sanctioned VRS monopoly that is immune to the market pressures that are needed to improve relay quality and foster technological innovation.

CSDVRS proposes instead a Variable Tiered Multi-Year Rate Methodology that would pay all providers the same amount for an equal volume of calls, but

reimburse providers with greater operating efficiencies at lower rates for minutes exceeding a certain volume, in order to account for those efficiencies. CSDVRS also urges that the rates established using this approach remain in effect for at least three year periods, to ensure stability and predictability. This approach would:

- fairly and reasonably compensate each provider based on that provider's volume;
- provide a competitive market that would deliver functionally equivalent VRS;
- provide for continued innovation that would allow consumers to receive the benefits of technological advances;
- provide for a savings in the size of the VRS funding requirement for the 2007-08 fund year;
- provide consistency for providers over a period of three years, after which the FCC and NECA can re-evaluate the sliding scale rate and thresholds;. and
- eliminate the need for the FCC and NECA to annually engage in inefficient long and drawn-out processes to calculate the VRS rate.

Before the
Federal Communications Commission
Washington D.C. 20554

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COMMENTS OF CSDVRS, LLC

I. Introduction and Background

CSDVRS, LLC hereby submits comments in response to the proposed provider payment formula and compensation rate for video relay service (VRS) submitted by the National Exchange Carriers Administration (NECA) to the Federal Communications Commission (FCC) on May 1, 2007.¹ Through its relationship with Sprint, CSDVRS serves as a provider of VRS throughout all fifty states and the United States territories.

For the past several years, VRS providers have expressed concerns about the lack of consistency, uniformity and transparency in the VRS ratemaking process. This process first began back on December 21, 2001, when the FCC temporarily adopted the same weighted average per minute compensation

¹ Payment Formula and Fund Size Estimate for the Interstate Telecommunications Relay Services Fund for the July 2007 through June 2008 Fund Year (May 1, 2007) (NECA Filing). The FCC invited comments on this NECA filing in a public notice released on May 2, 2007, DA 07-1978.

methodology as was used for traditional TRS.² At that time, the Commission declined to adopt this methodology on a permanent basis, uncertain as to whether this compensation method was best suited to VRS. The FCC next revisited the issue of VRS methodology in June of 2003, when the Consumer and Governmental Affairs Bureau (CGB) ordered the drastic reduction of the VRS compensation per minute rate and took other bold departures from prior TRS ratemaking practices, all without notice and comment.³ At the time, providers who had come to rely upon the prior methodology for their business plans were given less than a day to adjust their services to the new, dramatically different, compensation scheme.

Without the benefit of permanent rules for a VRS cost methodology, NECA cost recovery filings over the next two funding periods (2004-05 and 2005-06) again fell subject to considerable provider challenges and FCC adjustments. Last year, NECA's decision to use a weighted average for each cost category, after sixteen years of averaging combined per minute costs, was again criticized by providers as a departure from prior practice without explanation; it was also perceived as an attempt to micromanage VRS business models without justification.

² *Telecommunications Services for Individuals with Hearing and Speech Disabilities, Recommended TRS Cost Recovery Guidelines, Request by Hamilton Telephone Company for Clarification and Temporary Waivers*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Dkt No. 98-67, FCC 01-371(December 21, 2001) at ¶¶22-24.

³ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order*, CC Dkt No. 98-67, DA 03-2111 (June 30, 2003).

Over these many years, these sudden shifts in allowable expenses and rate methodologies have put VRS providers in the precarious position of never knowing whether and the extent to which their costs will be compensable. The consequences have been severe – not only for providers who have struggled to effectively develop their business plans, but for consumers who have not always been able to receive the functionally equivalent communication services envisioned by the Americans with Disabilities Act (ADA). For example, one only has to look to the matter of VRS emergency call handling to see that this has been the case. Despite the urgent and immediate need for VRS access to 9-1-1 public safety answering points, providers have never received assurances that they will be reimbursed for the research and development costs needed to develop a comprehensive and uniform system to handle these calls.

In an effort to end the instability and inconsistency that have characterized this VRS rate-setting history and once and for all determine an appropriate cost recovery methodology, in July of last year the FCC asked parties to refresh its VRS ratemaking docket.⁴ But without a resolution to this proceeding, arbitrary decision-making has once again become apparent in this year's NECA payment formula. Lacking the FCC guidance that it needed, somewhat astonishingly, this year NECA has come forward with as many as twenty-four different compensation rates based on at least six different rate methodologies –

⁴ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, CG 03-123, FCC 06-106 (July 20, 2006) (2006 FNPRM).

ranging from \$4.3480 to \$6.7738 – for the July 2007-June 2008 funding year. Beyond merely asserting the various methodologies employed, however, NECA does little to offer much in the way of explanation for how any of these would ensure fair and reasonable compensation to VRS providers. Indeed, an examination of these alternatives suggests evidence to the contrary.

The problem is that virtually all of NECA's alternatives utilize historical or projected costs and demand data that weigh the rate by the lowest cost provider's market share, a share which approximates 70-80 percent of the VRS market. For this reason, adoption of any of the proposed rates would be both inequitable to smaller providers, and inconsistent with FCC decisions made over the past two years to reject weighted rates that were driven by the cost and demand data of a single provider.⁵ Specifically, in 2005, the FCC rejected NECA's proposed weighted rate of \$5.924 because this would have fallen below the per minute costs of all providers except the dominant one. The Commission concluded that "a compensation rate based on the weighted average of the providers' costs would not fairly reflect the reasonable costs of providing service."⁶ It went on to explain that although it is generally not uncommon for a

⁵ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CC Dkt No. 98-67, CG 03-123, DA 05-135 (June 28, 2005) (2005 Order) at ¶9 n.37, citing NECA Payment Formula and Fund Size Estimate - Interstate Telecommunications Relay Services (TRS) Fund for July 2005 through June 2006 (April 25, 2005) (2005 Order) at 17 n.32.

⁶ 2005 Order at ¶28. NECA explained that if the cost and demand data of the low cost provider were excluded for 2005, the VRS per minute rate it would have proposed would have increased by \$1.137 per minute, to \$7.061. *Id.* at ¶9.

chosen rate to result in some providers being over-compensated and some being under-compensated, prior to the 2005 funding year, the use of providers' projected costs and minutes of use data to determine a weighted average had not created a problem for TRS providers. That year, however, there were reports that the dominant provider's costs were approximately \$2.00 lower than the costs of all other providers. This meant that with the exception of the single dominant provider, all other VRS providers would lose money for every VRS minute under the NECA-proposed weighted rate. Rejecting an outcome that would have been so unfair, the Commission decided instead to use the median rate of \$6.644 per minute as one that would offer a "just and reasonable rate" for compensating VRS providers.⁷ In 2006, the FCC again deemed it in the public interest to freeze this rate for the funding year ending June 30, 2007, or until such time as it resolved the pending issues concerning the VRS rate methodology, whichever was sooner.⁸

Once again, this year, NECA has found significant discrepancies between the average actual allowable costs of the dominant VRS provider and those of each of the other providers.⁹ Undoubtedly, this is because the cost per minute of

⁷ *Id.* at ¶26.

⁸ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG 03-123, DA 06-1345 (June 29, 2006), ¶29.

⁹ At the April 2007 meeting of the NECA Interstate TRS Advisory Committee meeting, NECA reported that the weighted average of VRS provider actual allowable costs for the 2006-07 funding year was \$4.47, while the non-weighted average was approximately \$7.00. This suggests that the difference between the actual allowable costs of the dominant provider and the smaller providers was

service delivered declines as the total volume of minutes of the service increases. As a VRS provider gets larger, it is able to operate its service more efficiently by taking advantage of operating efficiencies. Over the past two years, the dominance of the single largest VRS provider has increased considerably, with this provider now holding as much as 70-80 percent of the market. It is these economies of scale that have enabled that provider to have a substantially lower per minute cost than each of the smaller VRS providers. In this economic milieu – in which none of the other VRS providers hold market positions greater than 10 percent – it makes no sense whatsoever – and in fact would be highly anti-competitive and wasteful – to use a single rate that is based on a weighted average methodology.

Moreover, as was the case in 2005 and 2006, if the VRS compensation rate is brought down to a level that only exceeds that of the dominant provider, the service levels of the entire VRS industry will be driven down to this lowest common denominator. Eventually, competitors – without the funds to effectively compete for customers with a better service – will be driven out of the VRS industry, and a government sanctioned monopoly will be created. In the end, consumers will be the losers: they will have a single provider that is free to offer whatever service level it desires and gets rewarded through a federally administered program to do so.

II. Variable Tiered Multi-Year Rate Methodology

again at least \$2.00 and may have been as high as \$3.00 with respect to certain providers.

For the above reasons, adoption of a flat VRS rate would seriously impede the ability of smaller providers to recoup reasonable costs and be competitive in the VRS market. Because such a methodology is likely to endanger the survival of these providers, it would not only run counter to our nation's telecommunications policies; it would also severely impact the quality of video relay services for consumers, who will be left with no ability to choose the VRS provider that best suits their needs.

By contrast, a tiered rate structure that is based on minutes of use per month – wherein like volumes of minutes would be reimbursed at the same rate – has the ability to foster a competitive market that could best meet the needs of VRS providers and consumers, while also conserving money in the Interstate Fund. The FCC has consistently expressed an interest in promoting competition and fostering innovation among providers of communication services, and relay services in particular. For example, when the FCC expanded the category of providers eligible for certification to provide VRS and IP relay in 2005, it explained that such action would “enhance competition in the provision of VRS and IP Relay by permitting new entities to offer service, thereby giving consumers greater choice. In addition, we anticipate that new providers will bring innovation to the provision of VRS and IP Relay, both with new equipment and new service features.”¹⁰ Under a tiered approach, all providers – large and

¹⁰ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG 03-123, FCC 05-203 (December 12, 2005), ¶21. The FCC's decision to prohibit call

small – would be paid the same amount for an equal volume of calls, and providers with greater operating efficiencies would be reimbursed at lower rates for minutes exceeding a certain volume, to account for those efficiencies. While allowing both small and large providers to be compensated at a fair and reasonable level to cover their costs, this rate methodology will also provide incentives for providers to operate their businesses more efficiently, to maximize returns, and to explore technical innovation to attract more customers.¹¹

Past pleadings filed in the FCC’s VRS ratemaking proceeding also reveal a general consensus on the need to establish a multi-year rate that will (1) provide the stability and predictability needed for providers to effectively plan for the provision of their services and (2) allow providers to invest in cost-saving technologies that can improve relay quality.¹² All agree that the exercise of setting and changing the VRS rate annually has created unnecessary challenges for FCC, NECA, and VRS providers; the skirmishes that have ensued can be

blocking and require interoperability of equipment was also designed to foster competition. *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG 03-123, FCC 06-57 (May 9, 2006)

¹¹ On April 5, 2007, CSDVRS submitted a comprehensive proposal for a tiered rate methodology, offering by example the thresholds by which the rate could decrease as the volume of a provider’s minutes increases. As indicated in that filing, the example provided was intended to be illustrative only, and CSDVRS remains open to other models that may represent an appropriate sliding scale, as well as the associated compensation rates at each threshold. A copy of this proposal is being re-submitted with these comments.

¹² In its 2006 FNPRM, the FCC sought comment on whether a longer rate period would be appropriate for VRS. 2006 FNRPM at ¶31. In that proceeding, the FCC also expressed an interest in “adopting a methodology that would result in more predictability for the providers.” *Id.* at ¶28.

eliminated, or at least reduced, with a rate that stays in effect for at least three years.

III. Outreach and Marketing Costs Should be Compensable

Presumably per instructions from the FCC, some of the rates proposed by NECA for the 2007-08 funding year would categorically exclude costs associated with marketing and advertising. CSDVRS joins the many VRS providers who have previously stepped forward to protest such exclusions. For nearly fifteen years, the FCC has compensated outreach and marketing costs, understanding these to be necessary to expand public and user awareness of relay services, and therefore critical to fulfilling the ADA's goals of functional equivalency.

Dating back to 1991, the FCC has consistently and repeatedly affirmed that “public access to information regarding the availability, use of service, and means of access, is critical to the implementation of TRS.”¹³ For example, in March of 2000, the FCC explained that “TRS was designed to help bridge the gap between people with hearing and speech disabilities and people without such disabilities with respect to telecommunications services. The lack of public

¹³ Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Report and Order and Request for Comments, CC Dkt. No. 90-571, FCC 91-213 (July 26, 1991), ¶26. The TRS rules themselves require relay providers to ensure that “efforts to educate the public about TRS . . . extend to all segments of the public, including individuals who are hard of hearing, speech disabled, and senior citizens as well as members of the general population. 47 C.F.R. §64.604(c)(3).

awareness prevents TRS from achieving this Congressionally mandated objective.”¹⁴

Similarly, although rejecting the development of a NECA-funded national outreach program in June of 2004, the Commission made clear that provider costs for reasonable outreach efforts were compensable costs. The Commission explained:

outreach is an issue of recurring and serious importance for TRS users. Those who rely on TRS for access to the nation's telephone system, and thereby for access to family, friends, businesses, and the like, gain little from the mandate of Title IV if persons receiving a TRS call do not understand what a relay call is and therefore do not take the call, or if persons desiring to call a person with a hearing or speech disability do not know that this can easily be accomplished through TRS (and dialing 711). We also recognize the strong sentiment reflected in the comments that outreach efforts to date have not been adequate.”¹⁵

¹⁴ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000), ¶ 105. Similarly, the FCC’s 711 order stated that “on-going and comprehensive education and outreach programs to publicize the availability of 711 access in a manner reasonably designed to reach the largest number of consumers possible” would be necessary to achieve the successful use of this abbreviated dialing code. The Commission confirmed that “[t]o the extent costs of education and outreach are attributable to the provision of interstate TRS, . . . relay providers should include these costs as part of their annual data report of their total TRS operating expenses.” *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Second Report and Order, CC Dkt. No. 92-105, FCC 00-257 15, FCC Rcd 15188, (August 9, 2000), ¶61.

¹⁵ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Dkt. No. 90-571, CC Dkt. No. 98-67, CG Dkt. No. 03-123, 19 FCC Rcd 12475 (June 30, 2004) (2004 Report & Order), ¶95.

While some progress has been made in the efforts to educate deaf individuals about their telecommunication options over the past fifteen years, the number of individuals using VRS, when compared with the number of individuals who are potential candidates to use this service, reveal that the segregation and isolation that has characterized the deaf American population over the past several decades is far from over.¹⁶ As a statute designed to “remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities,”¹⁷ the goal of ADA, and specifically Title IV of that Act, was to fully integrate individuals with disabilities who previously had been denied communication access. Lack of access to the telephone for the first hundred years of its existence meant that the mere passage of the ADA would not be enough to achieve this goal. Rather, considerable effort would be needed to break through the segregation that had pervaded these communities for so many decades. A good part of this effort would require the education of consumers with hearing loss about their new rights.

However, unlike other sections of the ADA that were the subject of major outreach efforts conducted by the Department of Justice, protection and advocacy agencies, and technical assistance centers located throughout the country over the past fifteen years, the relay provisions have never truly had the benefit of a comprehensive nationwide outreach program. As a consequence, many

¹⁶ It is estimated that only 10 percent of all potential VRS consumers now use this service.

¹⁷ 2004 Report and Order at ¶179; 2006 FNPRM at ¶8.

individuals who are potential users of VRS or TRS remain, to this day, without knowledge of the existence of these services or the ways that this form of communication access can enhance their lives. Certainly, the Commission should not now penalize providers who are requesting the means to conduct such outreach.

Nor should the FCC exclude the costs of branded marketing. Marketing gives providers incentives to invest in new innovations and then share information about their particular service features with consumers. Denying compensation for marketing will not only hurt competition; it will hurt the ability of VRS consumers to select services and features that can best meet their individualized needs.

CSDVRS understands the FCC's interest in limiting the costs attributable to marketing and outreach to those which are reasonable. However, before taking such action, the FCC has an obligation to fully define these expenses, as well as to determine an appropriate standard of reasonableness, based on the feedback received in its pending ratemaking proceeding. Moreover, to the extent that the FCC has an interest in controlling the size of marketing and outreach costs, it should consider pulling these costs from the per minute rate and making equal distributions to *all* of the VRS providers, so that every provider, large and small, has the same opportunity to provide outreach and marketing to the user community.

IV. Costs Associated with Research and Development Should be Compensable

Under the ADA, the FCC is charged with promulgating regulations that encourage “the use of existing technology and do not discourage or impair the development of improved technology.”¹⁸ Consistent with this directive, until a few years ago, the FCC not only permitted, but encouraged TRS research and development, and regularly allowed the recovery of relay costs associated with these efforts. Indeed it was R&D that made VRS possible in the first place, and consequently has enhanced the lives of so many deaf Americans. By removing R&D from relay costs that are compensable, the present funding scheme has eliminated much of the incentive to research and invest in new and innovative service relay features. Without the ability to fund development for technical solutions, smaller providers are particularly hard hit. Even worse, the FCC’s decision to disallow reimbursement for R&D expenses is hindering the ability of CSDVRS and other providers to explore viable solutions to mandatory minimum standards which presently exist, but which are temporarily waived. The most notable of these standards is again the handling of emergency calls.

Although the FCC has said that reimbursement for R&D may be allowed to the extent that providers identify both the manner that a waived standard might be met and the projected costs needed to achieve that goal,¹⁹ the Commission nevertheless continues to reject R&D costs associated with meeting a temporarily waived standard, under the theory that functional equivalence is

¹⁸ 47 U.S.C. §225(d)(2).

¹⁹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, CG Dkt. No. 03-123, FCC 06-87 (July 12, 2006), ¶16.

defined only by the mandatory minimum standards that have not been waived.²⁰ This reasoning is illogical, both because it is difficult, if not impossible, to identify the manner in which a waived standard may be met without first conducting some exploratory R&D (which remains non-reimbursable), and second, because so long as a standard is only temporarily waived, providers must be ready to meet that standard, for the obligation to do may kick in at any time. Indeed, providers are obligated to submit annual reports to the FCC on temporarily waived standards specifically to inform the FCC of their efforts to develop technical solutions to meet these obligations. For these reasons, as so many providers have done in the past, CSDVRS again urges the Commission to reimburse a provider's efforts to develop technologies that are needed to meet temporarily waived relay standards or to otherwise achieve functional equivalency.

V. Conclusion

The FCC has expressed an interest in ensuring that “the use of TRS cost recovery methodologies and procedures . . . fairly and predictably compensate providers for the reasonable costs of providing service [in a way that] will not only be faithful to the intent of the ADA, but will also benefit all consumers.”²¹ CSDVRS lauds this goal; indeed, comments from thousands of consumers, together with the sharp growth in VRS use over the past several years, have

²⁰ *Id.* at ¶17.

²¹ 2006 FNPRM at ¶8.

confirmed the growing importance that VRS has come to play in the lives of deaf individuals.

In the interest of providing functionally equivalent VRS in a competitive environment, encouraging improvements to VRS, and fairly compensating all providers for their VRS expenses, CSDVRS urges the FCC to either adopt the Variable Tiered Multi-Year Rate Methodology for the next funding year, or to once again freeze the 2005 rate of \$6.644 until such time that the details of a tiered approach are resolved. In the event that the FCC is not ready to take either of the above steps, it should continue to freeze the current VRS rate to ensure stability and consistency for a third year or until it adopts a permanent VRS rate methodology that is based on submissions in the record in its pending rulemaking proceeding on VRS cost methodology. Under no circumstances should the FCC select one of the random 24 rates proposed by NECA, both because the record shows that a single rate would be inequitable and unreasonable, and because nothing in the NECA submission adequately justifies any of these rates. Finally, regardless of the methodology used, we again urge the FCC to allow compensation for research and development expenses, as well as provider costs associated with outreach and marketing.

Respectfully submitted,

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